131

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 605. ~~247~~ 81

JOHN JOHNSON, PLAINTIFF IN ERROR,

vs.

THOMAS L. RISK, L. TIFF RISK, JOHN D. MILBURN, H. C. WARRINER, AND EBEN L. RISK, A MINOR, BY HIS GUARDIAN ALICE H. RISK, AND FRANK DUNCAN AND JENNIE DUNCAN, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED AUGUST 19, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 665.

JOHN JOHNSON, PLAINTIFF IN ERROR,

vs.

THOMAS L. RISK, L. TIFF RISK, JOHN D. MILBURN, H. C. WARRINER, AND EBEN L. RISK, A MINOR, BY HIS GUARDIAN ALICE H. RISK, AND FRANK L. DUNCAN AND JENNIE DUNCAN, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 4, 1888.

a United States of America to Thomas L. Risk, L. Tiff Risk, John D. Milburn, H. C. Warriner, and Eben L. Risk, a minor, by Alice H. Risk, his guardian, Frank Duncan, and Mrs. Jennie Duncan, his wife, and Estee & Warriner, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1887, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Jackson, wherein John Johnson is plaintiff and you are defendants in error, to show cause, if there be any, why the judgment in the said writ mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this 5th day of May, 1887.

P. TURNEY,
Chief Justice.

b [Endorsed:] No.—. Supreme court of the State of Tennessee. John Johnson *vs.* Thos. L. Risk and others. Citation. Filed the — day of ——, A. D. 187–. ——, clerk.

Service acknowledged.

ESTEE & WARRINER, *Sols.*
J. M. GREGORY, *Sol.*

[In pencil:] Give this to Randolph.

1 Supreme Court of the United States.

Know all men by these presents that we, John Johnson, as principal, and Wm. M. Randolph, as surety, are held and firmly bound unto Thomas L. Risk, L. Tiff Risk, John D. Milburn, H. C. Warriner, and Eben L. Risk, a minor, by his guardian, Alice H. Risk, residents of Shelby county, Tenn., and Frank L. Duncan and Mrs. Jennie Duncan, his wife, residents of Cincinnati, Ohio, in the sum of five hundred dollars, to be paid to the said Thomas L. Risk, L. Tiff Risk, John D. Milburn, H. C. Warriner, and Eben L. Risk, by his guardian, Alice H. Risk, and Frank L. Duncan and Mrs.
2 Jennie Duncan, his wife, their executors or administrators; to which payment, well and truly to be made, — and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 4th day of May, 1887.

Whereas the above-named John Johnson hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named John Johnson shall prosecute his said writ

3 of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JNO. JOHNSON. [L. S.]
WM. M. RANDOLPH. [L. S.]

Acknowledged before me this 4th day of May, 1887.

——— ———.

(Endorsed:) Filed May 5th, 1887. Jno. W. Buford, clerk, by Rob't Lindsey, D. C.

Approved May 5th, 1887.

P. TURNEY, *Ch. Justice.*

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between John Johnson, plaintiff, and Thomas L. Risk, L. Tiff Risk, John D. Milburn, H. C. Warriner, and Eben L. Risk, a minor, by his guardian, Alice H. Risk, residents of *of* Shelby county, Tenn., and Frank L. Duncan and Mrs. Jennie Duncan, his wife, residents of Cincinnati, Ohio, defendants, wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, privilege, or exemption claimed under such statute by the said plaintiff, a manifest error hath happened, to the great damage of the said plaintiff, John Johnson, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1887, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 3d day of May, A. D. 1887, and 111th of American Independence.

{Seal of the Circuit Court of the United States for the District of West Tennessee.}

JOHN B. CLOUGH, *Clerk.*
——— ———, *D. C.*

Allowed May 4th, 1887.
P. TURNEY,
Chief Justice.

5 The execution of this writ of [illegible] script hereto attached.

JNO. W. BUFORD, Clerk.
By ROBT LINDSEY, D. C.

[Endorsed:] No. —. Supreme court of the State of Tennessee. John Johnson *vs.* Thos. L. Risk & others. Writ of error. Issued the 3d day of May, A. D. 1887. John W. Buford, cl'k, by Rob't Lindsey, D. C.

6 STATE OF TENNESSEE, *Shelby County,* } *ss:*

Chancery Court of Shelby County.

Pleas before the Honorable W. W. McDowell, chancellor of the chancery court of Shelby county, held in Memphis, and State and county aforesaid, and at the October term thereof, 1885.

Be it remembered that heretofore, to wit, October 28, 1885, John Johnson filed his bill of complaint against Thos. L. Risk, L. T. Risk, & *al.* in the court aforesaid in the words and figures following, viz:

In the Chancery Court of Shelby County, Tenn.

JOHN JOHNSON
vs.

7 THOMAS L. RISK, L. TIFF RISK, JOHN D. MILBURN, H. C. WARriner, and Eben L. Risk, by His Guardian, Alice H. Risk, all Residents of Shelby County, Tenn., and Frank L. Duncan and Mrs. Jennie Duncan, His Wife, Residents of Cincinnati, Ohio.

The plaintiff states and shows that prior to the 1st day of February, 1875, he and one E. F. Risk, since deceased, were copartners in business in the city of Memphis under the styles of Johnson, Risk & Co. and Risk & Johnson, doing a foundry and also a mercantile business.

On the said day the said firms were dissolved, and for ten
8 thousand dollars to him paid the plaintiff sold and conveyed to the said Risk his undivided half of the real estate belonging to the said firms, and also his interest in the machinery, tools, and stock of every kind belonging to the said firms, except the bills receivable, book accounts, and all debts of every kind belonging to the said firms, which were to remain the joint property of the said Risk and the plaintiff, but were to be collected by the said Risk and by him accounted for to the plaintiff, in the proportion of one-half to the plaintiff and the other to the said Risk, in the manner set forth in the deed of bargain and sale executed at the time, and a copy of which is filed with and is a part of this bill, and
9 marked Exhibit "A." One condition of the said sale was that the said E. F. Risk assumed the payment of each and

all the debts and liabilities of every kind whatever of each and both of the said firms of Johnson, Risk & Co. and Risk & Johnson, and bound and obligated himself to pay the same and protect and keep the said Johnson harmless from the payment of any part thereof.

Among the liabilities of the said firms of Johnson, Risk & Co. and Risk & Johnson which the said E. F. Risk so assumed to pay and so agreed to indemnify the plaintiff against was one to the defend-
ant, L. Tiff Risk, who was a son of the said E. F. Risk, de-
10 ceased. The said L. Tiff Risk declined suing his father for the said debt, notwithstanding he knew by the contract by which his father had gotton all the ass-ts of the said firms and had agreed to pay all their debts and liabilities, but brought suit against the plaintiff alone in the circuit court of Shelby county on the said debt so due him by the said firms of Johnson, Risk & Co. and Risk and Johnson, and on the 22nd day of April, 1878, he recovered judgment in the said circuit court against the plaintiff here for $1,260.87 and the costs of the suit. The said E. F. Risk never at any time paid any part of the said judgment, and on the 27th day of August, 1885, the plaintiff, for the purpose of satisfying the
11 said judgment, was obliged to pay and did pay the said L. Tiff Risk $1,000 in the manner following, to wit: He gave him his note for $150, of date 27th of August, due at four months, and another of same date for $850, due at six months, each note endorsed by A. W. Newson and W. J. Chase, and paid all the costs of the suit in which the judgment had been recovered, amounting to the sum of $—, in satisfaction of the said judgment so recovered by the said L. Tiff Risk against the plaintiff as aforesaid. No part of the said sum has been repaid the plaintiff, but the whole thereof remains due and unpaid.

The plaintiff further states & shows that on the 11th day of July, 1878, and after the recovery of the judgment aforesaid by
12 L. Tiff Risk against the plaintiff here, the said E. F. Risk filed his petition in the district court of the U. S. for the district of West Tennessee, under and in compliance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved on the 3rd day of March, 1867, and in such petition asked to be discharged from all his debts and liabilities then existing, and, subsequently, on the 20th day of December, 1878, a discharge was granted him by the court aforesaid in manner and form as declared in the said act. Subsequently, on the 20th day of June, 1882, the said E. F. Risk died intes-
tate in Shelby county, Tennessee, without ever having paid any
13 part of the said debt to the said L. Tiff Risk, on which judgment in his favor against the plaintiff here was recovered as aforesaid. On the 27th day of June, 1882, letters of administration were granted by the probate court of Shelby county to the defendant, Thomas L. Risk, who was qualified and became the administrator of said estate, and executed a bond as such administrator in the penalty of two thousand dollars, conditioned according to law, with the defendants, John D. Milburn and L. Tiff Risk, as his sureties. On the 21 day of August, 1882, the said Thomas L. Risk, as

such administrator [illegible]
the said E. F. Risk [illegible]
14 received from Memphis Lodge, No. [illegible]
lars, and from Cayoso Encampment, No. [illegible]
and from the sales of the interest of the said E. F. Risk in the late firm of L. Tiff Risk & Co. $300.00. The said inventory also contained a long list of personal property, as will appear thereby, to which no value was set. On the 27th day of September, 1882, the said Thomas L. Risk, as such administrator, filed in the probate court of Shelby county his final settlement of the estate of the said E. F. Risk in the said court without notice, as prescribed by law, being given to the creditors and others interested in the said estate.

On the same day an order was entered confirming the said final settlement and discharging the said Thomas L. Risk as such
15 administrator and cancelling his bond as such and releasing his sureties from further liability. By his said final settlement the said Thomas L. Risk, in addition to what was shown on hand by his inventory aforesaid, stated that the personal estate of the said E. F. Risk not valued in the said inventory had realized the sum of one hundred and twenty-six dollars and sixty cents, and that the whole amount with which he ought to have been charged as administrator was one thousand and twenty-eight dollars and forty-nine cents. He also showed the debts he had paid and his expenses of administration and the sum which remained for distribution among the distributees of the said, E. F. Risk, dec'd.
16 He then credited himself by the sums paid such distributees and for which he claimed to have their receipts as follows: To Mrs. Jennie Duncan, $202.56, paid 25th of September, 1882; to L. Tiff Risk, 202.56, paid 4th September, 1882; to Alice H. Risk, as guardian of the defendant, Eben L. Risk, who was the only child of E. F. Risk, Jr., dec'd, who was a son of the said E. F. Risk, dec'd, $202.56, paid September 26th, 1882, and to himself, Thomas L. Risk, the sum of $202.56, which he kept as his share.

The plaintiff further states and shows that the said Thomas L. Risk made the said payments to the said distributees without requiring or taking any refunding bond, as required by the statute, and paid the same, as the plaintiff is advised and submits,
17 in his own wrong and without the authority of the law, and he and his sureties on his administration bond, as the plaintiff also submits and avers, are now liable to the plaintiff here on account of the matters set out in this bill for the full amount of the said payments and interest thereon until paid. The plaintiff further states and shows that on the 1st day of December, 1883, on his own application, the defendant, Thomas L. Risk, was appointed by the probate court administrator *de bonis non* of the estate of the said E. F. Risk, deceased, and at that time he gave a bond as such administrator, conditioned according to law, with the defendants,
18 L. Tiff Risk and H. C. Warriner, as his sureties, in the penalty of one thousand six hundred dollars, and thereupon qualified and became and has since continued to be such administrator; but he has filed no inventory of the assets of the said estate

second appointment, and has taken no steps in the administration, so far as the plaintiff knows or believes.

Upon the state of facts aforesaid the plaintiff submits that the discharge in bankruptcy of the said E. F. Risk did not discharge him or his estates from liability to the plaintiff on the contract of indemnity, a copy of which is marked Exhibit "A," and a part of this bill, but such liability remains upon his estate and the said Thomas L. Risk, as administrator thereof, personally, as if no discharge in bankruptcy had been granted; and the plaintiff further submits that the said distributees to whom the said Thomas L. Risk distributed the sums aforesaid in the manner aforesaid, to wit, Mrs. Jennie Duncan and Frank L. Duncan, her husband, who are non-residents of the State of Tennessee and residents of Cincinnati, Ohio, and Alice H. Risk, as guardian of Eben L. Risk, her child, and the said L. Tiff Risk and Thomas L. Risk, all of whom reside in Shelby county, Tennessee, are liable and are bound by law to refund and pay the said sums so distributed to them, respectively, in order that the same may be applied towards the payment of the demand herein set up by the plaintiff against the estate of the said E. F. Risk, deceased, and the said Thomas L. Risk, as administrator.

In consideration of the premises the plaintiff prays that the parties named as such in the caption, and whose residences are correctly stated in this bill, may be made defendants and may be brought in by proper process, and required to answer this bill, but not under oath, as their oaths are hereby waived; that on the final hearing the plaintiff may have a decree against the defendants and each of them, or such of them as are liable, jointly or severally, for the sums they respectively owe him, and all other just, proper, and necessary relief.

WM. M. RANDOLPH,
Sol. for Pl'ff.

STATE OF TENNESSEE, *County of Shelby:*

I, John Johnson, plaintiff in the foregoing bill, do state on oath that the matters therein contained stated as of my own knowledge are true, and so far as stated from information I believe them to be true.

JNO. JOHNSON.

Sworn to & sub. before me Oct. 27, 1885.

J. W. BRADLEY, *D. C. & M.*

"EXHIBIT A."

This instrument, made and entered into on the 1st day of February, 1875, by and between John Johnson, of the first part, and E. F. Risk, of the second part, both of Memphis, Tennessee, witnesseth: That for and in consideration of ten thousand ($10,000) dollars to him paid, the receipt of which is hereby acknowledged, and the further consideration hereinafter mentioned, the said John Johnson has this day bargained, sold, and conveyed,

and does hereby [illegible]
his undivided half [illegible]
situated, lying, and being in the city of [illegible]
and State of Tennessee, designated as part of county [illegible]
bounded as follows, to wit: Beginning at a stake at the [illegible]
section of the east side or line of Lauderdale street with the [illegible]
side or line of Court street east of the depot grounds of the
23 Memphis & Charleston railroad, running thence eastwardly
or with the south side of Court street 188 feet to a point in the
northeast corner of the brick foundry building known as the [illegible]
dry building of Johnson, Risk & Co.; thence southwardly at right
angles with Court street 148½ feet to an alley; thence westwardly
parallel with Court street 188 feet to the east side of Lauderdale
street as straightened; thence northwardly on and with the east side
of Lauderdale street 148½ feet to the beginning:

To have and to hold the aforesaid land, with all & singular the
rights, privileges, and appurtenances thereunto belonging,
24 together with all the tools & machinery of every sort & kind
whatever now on said lot & in said foundry, to the only proper
use & behalf of him, the said E. F. Risk, his heirs & assigns, forever; and
the said John Johnson covenants that he will warrant and defend the
title to said property to the said E. F. Risk, his heirs and assigns
against the legal claims or rights of all persons whomsoever. This
instrument further witnesseth that the firms of Johnson, Risk & Co.
and of Risk & Johnson are this day dissolved, the said Johnson selling
all his interest in the machinery, tools, and stock of every kind
on hand belonging to both firms to the said E. F. Risk, and part of
the consideration for said sale and the above conveyance is
25 that the said Risk assumes payment of each and all the debts
and liabilities of every kind whatsoever of each and both of
said firms, and binds and obligates himself to pay the same and
protect and keep said Johnson harmless from the payment of any
part thereof, the bills receivable, book accounts, and all debts of any
kind payable or belonging to said firms, whether due or not due,
remains and continues the joint property or credits of the two parties,
John Johnson and E. F. Risk, but said Risk takes charge of
the collections and is to collect said debts as fast as practicable for
distribution between the two without charge therefor, except in such
cases as he may have to employ lawyers or other persons in discon-
nection with his business, which cases he will be allowed his
26 necessary costs and charges expended. The one-half of the
collections made on said debts belonging to Johnson shall be
paid over to him by Risk as follows, to wit: $150.00 shall be paid
in cash at the end of each and every month until all be collected,
and whenever at the end of a month the collections made amount
to one thousand dollars or more in excess of the monthly payment
or payments of $150 made to Johnson and a like amount retained
by Risk, then he, the said Risk, is to execute his note to Johnson for
one-half of said collections, payable eight months after date, with
interest from date at the rate of eight per cent. per annum.

Said Johnson, by agreement, hereby retains a lien upon
27 the real estate and machinery hereinabove conveyed, and said Risk grants and acknowledges the same, together with a lien, equal to and like a mortgage upon his other undivided half of said foundry property, both land and machinery, to secure to Johnson the faithful performance of the undertaking herein made by the said Risk, which are that he will pay over to Johnson at the end of each month $150.00; one half of all other collections eight months after they are made, with interest thereon — eight per cent. per annum, and pay all the debts outstanding owing by the said two firms or either of them.

In the event that Johnson should have to pay any of said
28 debts or be sued therein or should not be paid his half of the collections made as stipulated above, then he may proceed forthwith to enforce the liens herein retained and granted by proper proceeding therefor. Mr. Risk is to keep the books and make entries showing all the collections, and which shall at all times be accessible to said Johnson for inspection.

This Feb. 1, 1875.

Cost Bond.

We, John Johnson and s'ty, acknowledge ourselves indebted to Thos. L. Risk *et al.* in the sum of two hundred and fifty dollars, to be void if the said John Johnson, complainant in a bill which has
29 this day been filed in the chancery court of Shelby county against the said Thos. L. Risk *et al.*, shall pay all such costs as may be awarded against him by the court in its decrees and orders in said cause.

This 27th day of Oct., 1885.

JOHN JOHNSON.
J. G. HANDWERKER.

Spa. to Answer. Issued Oct. 29, '85.

The State of Tennessee to the sheriff of Shelby county:

Summon Thos. L. Risk, L. Tiff Risk, Jno. D. Milburn, H. C. Warriner, Eben L. Risk & guardian, Alice H. Risk, if to be found in your county, to appear before the chancery court of Shelby county, at the court-house in Memphis, Tenn., on the first Monday in Dec. next, then and there to answer the bill of complaint of
30 John Johnson, a copy of which accompanies this writ. Herein fail not, and have you then and there this writ.

Witness Sam'l I. McDowell, clerk and master of said court, at office, in Memphis, this first Monday in Oct., 1885.

S. I. McDOWELL,
Clerk & Master,
By H. F. WALSH,
D. C. & M.

Endorsed: Executed Nov. 4, '85, on all the within-named parties, except E. L. Risk & Alice H. Risk, whom I could not find in my county, and left with L. Tiff Risk a copy of the bill. W. D. Cannon, sh'ff, by C. R. Stewart, D. S.

Demurrer of Thos. L. Risk, Admr., &c., John D. Milburn, & H. C. Warriner. Filed Dec. 19, 1882.

31 In the Chancery Court of Shelby County.

JOHN JOHNSON
vs.
THOS. L. RISK *et als.*
} No. 5909, R. D.

The joint and separate demurrer of Thomas L. Risk, in his own right and as administrator *de bonis non* of E. F. Risk, dec'd, John D. Milburn, and H. C. Warriner to the bill of complaint filed against them and others in the above-stated cause.

And these demurrants, not admitting or confessing, &c., say that said bill is not sufficient in law to require an answer of them or of either of them, and they therefore demur thereto, and for cause of demurrer say—

1st. That there is no equity on the face of the bill.

2nd. That it clearly and sufficiently appears on the face of
32 the bill and the exhibit thereto that on 20th day of December, 1878, a discharge in bankruptcy, " in manner and form as declared " by the bankrupt law of the United States, was granted to E. F. Lisk in his lifetime by the district court of the United States for the western district of Tennessee, on petition duly filed in said court by the said Risk on 11th July, 1878, and that thereby and by force of the bankrupt law the said Risk was released from all debts, claims, and demands which were or might have been proved against his estate in bankruptcy.

And it further sufficiently appears from the face of the bill & exhibit that the demand set up by the complainant in his bill
33 was provable against the bankrupt estate in the bankrupt proceeding — was released by the discharge in bankruptcy.

3rd. That it appears from the face of the bill & exhibit that the discharge in bankruptcy set forth in the bill did discharge the said E. F. Risk and his estates from liability to the plaintiff on the contract & demand set up in this suit.

4th. That it clearly appears from the face of the bill and exhibit that the demand set up by the plaintiff is released and forever barred by the discharge in bankruptcy mentioned therein, & for this reason neither of these demurrants is in any manner liable to the plaintiff thereon.

34 5th. That it is clear from the face of the bill & the exhibit that plaintiff's cause of action (if any existed) is and was barred by the statute of limitations of two years and six months (Code, sec. 2784) from the grant of letters of administration to demurrant, Thomas L. Risk, on 27 June, 1882, which period elapsed long before the institution of this suit.

6th. That it sufficiently appears from the face of the bill and the exhibit that plaintiff's supposed cause of action did not accrue within six years next before the bringing of this suit, and is therefore barred

by the statute of limitations of Tennessee in such cases made and provided.

35 7th. That it sufficiently appears from the face of the bill that demurrant, H. C. Warriner, as the surety on the bond given by Thomas L. Risk as administrator *de bonis non* is in no manner liable to the plaintiff for the demand sued on in this cause.

In law the administrator *de bonis non* simply took up the administration where the first administrator left off, and it is alleged that the latter distributed the estate during the first administration, and it is not shown that the administrator *de bonis non* has ever received or held any assets.

For these causes these demurrants demur to the bill and pray judgment, &c.

ESTES & WARRINER, *Sol's.*

Demurrer of L. Tiff Risk. Filed Dec. 10, '85.

36 STATE OF TENNESSEE:

Shelby County Chancery Court.

JOHN JOHNSON
vs.
THOS. L. RISK, L. TIFF RISK, *et al.* } 5900.

The demurrer of L. Tiff Risk to the bill of complaint filed against him and others in the above-named cause.

Said respondent comes and demurs to the bill of complaint, and for causes thereof says:

1st. The bill on its face shows that the debt claimed in the bill and sued for has been discharged by the discharge in bankruptcy which the bill shows was granted to E. F. Risk, the partner who assumed payment of the partnership debt which complainant alleges he has paid.

37 2nd. The bill shows on its face and by "Exhibit A" thereto that E. F. Risk assumed payment of the firm debts, which only made him liable for the whole debts, as between him and complainant, when, as between them, he had previously been liable for only one-half. By the contract he agreed to pay all of the debts instead of one-half, as before bound. He then only owed the entire indebtedness instead of one-half; nothing more. No trust relationship arose from the mere contract by which he assumed payment of and agreed to pay the whole debt.

3rd. In assuming liability of the entire indebtedness of his two firms and to protect Johnson from liability therefor E. F.
38 Risk did not make himself trustee, but simply increased his liability by contract as between him and complainant.

4th. The bill shows that after E. F. Risk contracted the debt and liability sued for in the bill and assumed payment of it with complainant he filed his petition in bankruptcy, and by the U. S. dist. court was discharged from all his debts, and fails to show wherein

he was not discharged from [illegible]
discharged from it.

5th. The bill shows that judgment was [illegible]
in 1878, and that he then had right to sue [illegible]
until Oct., 1885, some seven and a half years after [illegible]
39 of action accrued, and that he and his said suit are barred by
the statutes of limitation of the State of Tennessee of—

1st. Six years.

2nd. Seven years.

3rd. Two and a half years—

against administrators.

6th. The bill shows that complainant had been sued and judgment had against him on the claim mentioned therein before discharge had in bankruptcy by E. F. Risk, and as complainant shows or alleges a right to payment from said Risk he shows by the bill that the claim then in his favor was provable in bankruptcy and is discharged by the discharge in bankruptcy.

40 For these and other good and sufficient causes said respondent doth demur, and prays judgment of the court if he shall make other or further answer herein.

J. M. GREGORY, *Sol'r.*

Decree Sustaining Demurrer Dismissing Bill, and Appeal. Ent. Feb. 9, '86.

JOHN JOHNSON
vs.
THOS. L. RISK *et als.* } No. 5900, R. D.

Be it remembered that this cause was heard this day before the chancellor upon the bill and the exhibit and the demurrers of all the defendants thereto, and, the matters and questions of law involved therein having been fully argued by counsel and the
41 court being satisfied that the said demurrers are well taken and ought to be sustained, it is therefore adjudged and decreed that said demurrers be sustained and the complainant's bill be dismissed at his costs, for which let execution issue against him and J. G. Handwerker, his surety on the cost bond.

From this decree the complainant prays an appeal to the next term of the supreme court of Tennessee to be held for the western division of the State at Jackson, on the first Monday in April, 1886, and the appeal is granted on condition that the compl't executs an appeal bond in the penalty of $250, with satisfactory security therein, and conditioned as prescribed by law.

Appeal Bond. Filed Feb'y 13, '86.

42 We, John Johnson, appellants, and surety, acknowledge ourselves indebted to Thos. L. Risk *et al.*, appellees, in the sum of two hundred and fifty dollars, to be void if the said John Johnson above named, as appellants, who has prayed for and obtained an

appeal from the decree of the chancery court of Shelby county, in a cause in which John Johnson is complainant and Thos. L. Risk *et al.* are defendants, to the next term of the supreme court of Tennessee for the district of West Tennessee, to be held at Jackson, Madison county, on the first Monday in April next, shall pay all such costs as shall be awarded against him by said supreme court.

43 This 13 day of Feb'y, 1886.

JOHN JOHNSON. [SEAL.]
W. J. CHASE. [SEAL.]

44 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at Jackson, at the April term, A. D. 1887.

Present: The Hon. Peter Turney, chief justice, and D. L. Snodgrass, H. H. Lurton, W. C. Caldwell, and W. C. Folkes, associate judges, when the following proceedings were had, to wit:

JOHN JOHNSON
vs.
THOMAS L. RISK *et al.* } # 1164, Shelby Chancery Docket.

THURSDAY, *April 28th*, 1887.

This cause came on to be heard on transcript of the record from the chancery court of Shelby county, and, the same having been argued by counsel and considered by the court, it is ordered,
45 adjudged, and decreed that there is no error in the decree rendered by the court below, and that the same be, and it hereby is, in all things affirmed and the bill dismissed, and that complainant, John Johnson, and surety on cost bond, J. G. Handwerker, pay the cost of the court below, and they and surety on appeal bond pay the costs of the appeal, for which let execution issue.

46 THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State, for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the transcript of the record now on file in my office and copy of decree of supreme court pronounced by said court at its April term, 1887, in the case of John Johnson against Thomas L. Risk *et al.*, as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 23rd day of July, A. D. 1887, and of the Independence of the United States the 112th year.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD, *Clerk*,
By ROB'T LINDSEY, *D. C.*

Received of Wm. [illegible]
of transcript fee in this case, this [illegible]

[illegible]
By ROBT. LINDSEY, D. C.

Endorsed on cover: Tennessee sup. court. No. 665. John Johnson, plaintiff in error, vs. Thomas L. Risk, L. Tiff Risk, John D. Milburn, H. C. Warriner, and Eben L. Risk, a minor, by his guardian Alice H. Risk, and Frank L. Duncan and Jennie Duncan, his wife. Filed August 19th, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

JOHN JOHNSON, PLAINTIFF IN ERROR,

vs. } *No. 665.*

THOMAS L. RISK AND OTHERS, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Tennessee.

ASSIGNMENT OF ERRORS.

The plaintiff in error, John Johnson, comes and says that in the record and proceedings of the court below, and in the pronouncing of the judgment or decree therein, there is manifest error in this:

1st. That the said court erred in sustaining the several demurrers of Thos. L. Risk in his own right and as administrator of E. F. Risk, deceased, John D. Milburn and H. C. Warriner, and of L. Tiff Risk, to the plaintiff's bill of complaint, and in affirming the decree of the court below, dismissing such bill of complaint.

2d. That said court erred in holding and decreeing that the discharge in bankruptcy granted E. F. Risk, deceased, the intestate of the defendant in error, Thos. L. Risk, on the 20th day of December, 1878, discharged the liability of the said E. F. Risk and of his representatives to the plaintiff in error for and on account of the cause of action set out in the plaintiff's bill of complaint, and in dismissing the plaintiff's bill of complaint because of such discharge in bankruptcy.

3d. The said court erred in not overruling the demurrers of the said defendants respectively, and in dismissing the bill of complaint.

WM. M. RANDOLPH,
For Plaintiff in Error.

STATEMENT OF FACTS ON THE PART OF THE PLAINTIFF IN ERROR.

On the 28th day of October, 1885, John Johnson filed his bill of complaint against Thos. L. Risk, L. Tiff Risk, Jno. D. Milburn, H. C. Warriner, Eben L. Risk, a minor, by his guardian, Alice H. Risk, all residing in Shelby county, Tennessee, and Frank L. Duncan and his wife, Jennie, residing in Cincinnati, Ohio. The bill stated in substance, as follows:

That prior to the 1st of February, 1875, the plaintiff Johnson and one E. F. Risk, since dead, were co-partners in business in Memphis under the style of Johnson, Risk & Co., and Risk & Johnson, doing a foundry and also a mercantile business. On the 1st of February, 1875, the firms were dissolved, and for ten thousand dollars paid Johnson by Risk, he sold and conveyed to Risk his undivided half of the real estate belonging to the firms; and also his interest in the machinery, tools, and stock of every kind belonging to the said firms, except the bills receivable, book accounts, and all debts of every kind belonging to the said firms, which were to remain the joint property of the said Risk and Johnson, but were to be collected by the said Risk, and by him accounted for to Johnson in the proportion of one-half to Johnson and the other to said Risk, in the manner set forth in the deed of bargain and sale executed at the time, and a copy of which was filed with and as a part of the bill, and made an Exhibit thereto.

The bill went on further to state that one condition of the sale was that Risk assumed the payment of each and all the debts and liabilities of every kind, of each and both the firms of Johnson, Risk & Co., and Risk & Johnson, and bound and obligated himself to pay the same and protect and keep the said Johnson harmless from the payment of any part thereof. Among the liabilities of the said firms so assumed by the said Risk, and which he so agreed to indemnify Johnson against, was one to his son, L. Tiff Risk. L. Tiff Risk declined suing his father for the debt, notwithstanding he knew of the contract by which his father had gotten the assets of the old firms, and that he had agreed to pay all their debts and liabilities, but brought a suit against Johnson alone in the circuit court of Shelby county for his debt so owing him by the said firms, and on the 22d day of April, 1878, he recovered a judgment in the said court against Johnson for $1260.87 and the costs of the suit.

The bill went on further to state that E. F. Risk never paid any part of the judgment or the debt, and on the 27th of August, 1885,

Johnson, for the purpose of satisfying the judgment, was obliged to pay, and did pay L. Tiff Risk $1000 in the manner stated in the bill in satisfaction of the judgment so recovered against him by the said L. Tiff Risk. The bill then alleged that no part of the sum so paid by Johnson had been repaid him, but the whole remained unpaid and due. The bill went on further to state that on the 11th July, 1878, and after the recovery of the judgment by L. Tiff Risk against Johnson, in the circuit court of Shelby county, the said E. F. Risk filed his petition in bankruptcy in the District Court of the United States for the District of West Tennessee, under and in pursuance of the act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved on the 2d day of March, 1867, and in such petition asked to be discharged from all his debts and liabilities then existing. And subsequently, on the 20th day of December, 1878, a discharge was granted the said E. F. Risk by the said court in manner and form as declared in the said act. Subsequently, on the 20th day of June, 1882, the said E. F. Risk died intestate in Shelby county, Tennessee, without ever having paid any part of the debt to L. Tiff Risk on which the judgment in his favor against Johnson was recovered. On the 27th of June, 1882, letters of administration were granted by the probate court of Shelby county to the defendant Thos. L. Risk, who qualified and became the administrator of the estate of the said E. F. Risk, and executed a bond as such administrator in the penalty of two thousand dollars, with the defendants, Jno. D. Milburn and L. Tiff Risk, as his sureties.

On the 21st day of August, 1882, the said Thomas L. Risk, as such administrator, filed an inventory of the assets of the estate of the said E. F. Risk, and therein showed certain assets, which were set out in the bill.

On the 27th of September, 1882, the said Thos. L. Risk as such administrator filed in the probate court of Shelby county, his final settlement of the estate of the said E. F. Risk, but gave no notice thereof as prescribed by law to the creditors or others interested in the estate. On the same day an order was entered confirming the final settlement of the said Thos. L. Risk, as such administrator, and cancelling his bond as such and releasing his sureties from further liability. In his final settlement Thos. L. Risk showed, in addition to what his inventory contained, that the personal estate of E. F. Risk, deceased, not valued in the inventory, had realized a certain sum, and that the whole amount with which he ought to have been charged as administrator was $1,038.49. He showed the debts he had paid, and his expenses of administration, and the sum which remained for dis-

tribution among the distributees of the said E. F. Risk, and then credited himself by sums paid such distributees, and for which he claimed to have their receipts.

The bill further stated that the said Thos. L. Risk paid the distributees without requiring or taking any refunding bond, as required by the statute, and claimed that he made such payments in his own wrong, and without the authority of the law, and that he and his sureties on his administration bond were liable to the plaintiff on account of the matters set out in the bill for the full amount of such payments and interest.

The bill further stated that on the 1st of December, 1883, on his own application, the defendant Thos. L. Risk, was appointed by the probate court administrator *de bonis non* of the estate of the said E. F. Risk, deceased, and at that time gave a bond as administrator with L. Tiff Risk and H. C. Warriner as his sureties, and thereupon qualified and again became such administrator, and has since continued to be, but has filed no inventory of the assets of the estate since his second appointment, and has taken no steps in the administration.

Upon the state of facts just recited the bill claimed the discharge in bankruptcy of E. F. Risk, deceased, did not discharge him or his estate from liability to Johnson on the contract of indemnity before mentioned, exhibited with the bill, but such liability remained upon his estate and upon Thos. L. Risk as his administrator, as if no discharge in bankruptcy had been granted; and, further, that the distributees to whom Thos. L. Risk as administrator had distributed the sums as before stated, were liable and bound by law to refund and pay the sums distributed to them respectively, in order that the same might be applied to the payment of the demand due Johnson, set up in the bill. The prayer of the bill was, after praying process, and waiving the oaths to the answers, that on the final hearing Johnson might have a decree against the defendants and each of them, or such of them as were liable, jointly or severally, for the sums they respectively owed him, and all other just, proper and necessary relief. Record pp. 1–6.

The defendants, Thos. L. Risk, in his own right and as administrator of E. F. Risk, deceased, Jno. D. Milburn and H. C. Warriner filed their joint demurrer to the bill. The defendant L. Tiff Risk also filed his demurrer separately. The substantial ground of the demurrers is this:

That E. F. Risk was released from the debt sued for by his discharge in bankruptcy granted on the 20th of December, 1878, as

before stated, on his petition in bankruptcy filed on the 11th of July, 1878.

The demurrers also set up, as further defenses, that the demand was barred by the statute of limitations of the State of Tennessee of two years as contained in the Code of 1858, sec. 2784, and also the general statute of limitation, of the same State, of six years.

There is also another ground of demurrer, that Warriner, as the surety on the bond of Thomas L. Risk as administrator de bonis non, was in no manner liable for the demand sued for. Record pp. 9-11.

The demurrers were heard in the chancery court of Shelby county, on the 9th day of February, 1886, and the court was of opinion that they were well taken, and sustained them, and dismissed the bill absolutely. Record p. 11.

An appeal from this decree was taken to the Supreme Court of Tennessee, at Jackson, on the first Monday of April, 1886, and on the 28th of April, 1887, the cause was heard, and the Supreme Court found and decreed that there was no error in the decree of the court below, and affirmed the same, and dismissed the bill, and adjudged the costs of the court below and the Supreme Court against Johnson. Record p. 12. From this decree the present writ of error has been sued out.

ARGUMENT FOR PLAINTIFF IN ERROR.

The case turns entirely, as I understand it, on the question of the effect of the discharge in bankruptcy of E. F. Risk, upon the liability to Johnson stated in the bill of complaint. Risk's contract with Johnson was dated on the 1st day of February, 1875. Record p. 8. The judgment of L. Tiff Risk against Johnson was recovered on the 22d day of April, 1878. E. F. Risk filed his petition in bankruptcy on the 11th July, 1878; he obtained his discharge in bankruptcy on the 20th of December, 1878; he died on the 20th day of June, 1882. Letters of administration on his estate were granted first to L. Tiff Risk on the 27th of June, 1882. Johnson paid the judgment recovered against him by L. Tiff Risk for the debt of Johnson, Risk & Co., or Risk & Johnson, which Risk had agreed to indemnify Johnson against by his contract above referred to, on the 27th day of August, 1885, and this suit was begun on the 28th day of October, 1885. Record p. 4.

The substantive part of the contract now to be considered, is as follows: "The said Risk assumes payment of each and all the debts

and liabilities of every kind whatsoever of each and both of said firms, and binds and obligates himself to pay the same, and protect and keep said Johnson harmless from the payment of any part thereof." Record p. 7. There is this further provision having reference only to the enforcement of the liens retained in a prior part of the contract, that is to say: "In the event that Johnson should have to pay any of said debts, or be sued thereon, or should not be paid his half of the collections made as stipulated above, then he may proceed forthwith to enforce the liens herein retained and granted, by a proper proceeding therefor." Record p. 8. I do not understand that this provision has any reference to the personal liability of Risk to Johnson under the contract, but refers only to the liens retained upon the property in the paragraph of the contract just preceding the portion I have quoted.

The act of Congress declared, "A discharge in bankruptcy, duly granted, shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy."

Sec. 34, Chap. 176, Act of March 2, 1867, U. S. Revised Statutes 5119.

And the discharge itself, the form of which was also prescribed in the act of Congress, declared that the bankrupt "is forever discharged from all debts and claims which by the said act are made provable against his estate."

Sec. 32, Chap. 176, Act of March 2, 1867, Revised Statutes U. S. 5115.

It is quite manifest, therefore, that the question turns entirely upon the fact whether Johnson had a provable debt or claim against E. F. Risk, at the time he filed his petition in bankruptcy on the 11th of July, 1878, or on the 20th of December, 1878, when Risk obtained his discharge. If Johnson had such provable debt, then he has no cause of action here, and if he had not a debt which could be proved against the estate in bankruptcy, then his right of action exists. What debts were provable in bankruptcy depended entirely upon the provisions of the act of Congress, and it will be necessary to examine those provisions critically, to determine the question.

The investigation is to be begun in view of the express declaration in the act itself, that "no debts other than those specified in the five

preceding sections shall be proved or allowed against the estate" of the bankrupt.

Sec. 19, Chap. 176, Act of March 2, 1867, Revised Statutes U. S., Sec. 5072.

It is to be noticed that the word used in the portion of the act of Congress just quoted, is "specified." This word is exact, and as I understand it, requires that there should be express mention within some one of the sections referred to of every debt which could be proved against the estate of the bankrupt under the provisions of the act. It cannot be pretended that Risk owed Johnson any debt due or to become due when he filed his petition in bankruptcy, or was liable to him for any goods or chattels wrongfully taken, and therefore this case does not come within that portion of sec. 19, of the act of March 2, 1867, embraced in sec. 5067, of the Revised Statutes of the United States, unless it comes within the following clause of that section: "When the bankrupt is liable for unliquidated damages arising out of any contract, or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate."

Without stopping to argue the question here, but reserving it for the present, I will quote such portions of the other sections above referred to as may be material to be considered in this connection:

"In all cases of contingent debts and contingent liabilities contracted by the bankrupt and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed with the right to share in the dividends if the contingency happens before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

Sec. 19, Chap. 176, Act of March 2, 1867, Revised Statutes U. S. 5068.

"When the bankrupt is bound as drawer, endorser, surety, bail, or guarantor upon any bill, bond, note or any other specialty, or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared."

Sec. 19, Chap. 176, Act of March 2, 1867, Revised Statutes U. S., Sec. 5069.

"Any person liable as bail, surety, guarantor, or otherwise, for the bankrupt who shall have paid the debt, or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if the creditor has proved the same, although such payment shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same, or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders."

Sec. 19, Chap. 176, Act of March 2, 1867, Revised Statutes of U. S., Sec. 5070.

I.

Recurring then for a moment to that portion of sec. 5067, Revised Statutes of the United States, above quoted, which has reference to unliquidated damages arising out of any contract or promise, it is quite clear, upon the facts already stated, that when Risk filed his petition in bankruptcy, and obtained his discharge, he was not liable to Johnson for any such damages, for the simple reason that at that time Johnson had suffered no loss, and had paid nothing on account of the debt due L. Tiff Risk, or the judgment L. Tiff Risk had recovered against him for the debt, and consequently it was a matter of impossibility for the bankrupt court to cause such damages to be assessed, so that the sum assessed might have been proved against the estate in bankruptcy. In other words, there had been no breach up to that time by E. F. Risk of his contract "to protect and keep said Johnson harmless from the payment of any part" of the debts and liabilities of Johnson, Risk & Co., and Risk & Johnson, assumed by Risk, as shown by his contract with Johnson exhibited with the bill.

II.

Was the liability of Risk to Johnson by the contract between them a "contingent debt, or a contingent liability contracted by the bankrupt, and not otherwise provided for in the act," within the meaning of sec, 5068, Revised Statutes of the United States? To come within the first clause of that section it was necessary that the "contingency should happen before the order for the final dividend," since the right of the creditor to make his claim was made by the words of

that clause of the section to depend upon the happening of the contingency within the time specified.

As Johnson was not obliged to pay the debt to L. Tiff Risk until years after the filing of the petition in bankruptcy of E. F. Risk, and years after his discharge, it is quite clear that the contingency, to-wit, the failure of E. F. Risk to protect and keep said Johnson harmless from the payment of the debt of Johnson, Risk & Co., or Risk & Johnson to L. Tiff Risk, did not occur before the order for the final dividend of E. F. Risk's estate in bankruptcy. It is true the latter clause of the sec. 5066 extended to the creditor the privilege to apply to the court at any time to have the present value of the contingent debt or liability ascertained and liquidated, and authorized the court to have the same done, and then provided that the creditor should be allowed to prove the amount so ascertained. But, as has been already remarked, under the last head, Risk was under no existing liability to Johnson, for the simple reason that Johnson had paid no part of the debt to L. Tiff Risk, and had not been injured in any way by the failure of E. F. Risk to pay that debt, and there was no conceivable way to ascertain the then value of the supposed claim Johnson held against E. F. Risk; or to speak more definitely, there was in fact no such claim, or the claim had no value. It necessarily follows, therefore, that there could be no ascertainment by any known rule of the value of the rights of Johnson against E. F. Risk under the contract, and consequently no ascertainment of any amount to be proved against the estate of E. F. Risk in bankruptcy.

The distinction between a "contingent liability" and a "liability depending upon a contingency," is well established. The one is provable, the other is not. A contingent liability is an existing demand, fixed, established, determined, but the cause of action upon it depends on some future contingency. A liability depending upon a contingency is one, the very existence of which depends upon some future event, but at the time, and before the happening of the contingency, it is only inchoate, initiated, but not complete. "Liability" is doubtless broader than "debt," but the contingent element is the same in both. The same facts and circumstances which render a contingent liability resting on unliquidated claims not provable because of some contingent event, will have the same effect upon a fixed debt. A promise to pay a certain fixed sum, if the promisor is ever able, is a contingent promise and may be proved in bankruptcy, although the contingency does not occur until after the

petition is filed. This is the nature of the liability of an insurance company before a loss, if the loss occur before the final dividend, though after the bankruptcy, and such a demand is provable in bankruptcy.

In re American Plate Glass Co., 12 Bankruptcy Register, 56.

If a debtor makes his note to his creditor for part of the amount due, and deposits it with a third person to be delivered, if the creditor will accept it in full payment, and while it is in the hands of such third person the debtor goes into bankruptcy, the debtor at that moment is contingently liable on the note; and if the creditor afterward accepts it within the terms of the original offer, the creditor may prove the demand as an existing contingent liability at the date of the petition.

Spalding v. Dixon, 21 Vt. 45.

The promise of an endorser of negotiable paper is a contingent liability, certain in amount; but its enforcement, or the cause of action thereon, is dependent upon the future contingency of due demand and notice. Such a claim is therefore provable against the endorser, although the contingency, that is, the demand and notice, had not happened at the commencement of the proceedings in bankruptcy. For the same reason the liability of a surety or guarantor may be proved against him, though the default of the principal does not occur until after the surety has gone into bankruptcy. All these are contingent liabilities, properly so called.

On the other hand, the liability of the principal to reimburse his surety, is not a contingent liability, but a liability depending wholly upon a contingency, that is to say, the contingency of the surety paying the debt, and which may or may not happen even though the principal has made default in the payment of such debt. No liability of the principal exists to the surety, until the surety has paid the claim, and the surety has no cause of action until that time. Consequently, but for the express provision in the bankrupt act of March 2, 1867, Revised Statutes U. S. 5070, if the surety had not paid the debt prior to the bankruptcy of the principal, he could not afterwards pay it and prove his claim against the estate in bankruptcy. In other words, he could not make the proof of the debt merely under the "contingent liability" clause. There was no liability from the bankrupt to him at the time of the bankruptcy, but only a liability to a liability, or an exposure to a liability, but no more.

McMullin v. The Bank of Penn. Township, 2 Penn. St. 343.

Cake v. Lewis, 8 Penn. St. 498.

Ecker v. Bond, 45 Maryland 278.

In this manner, if one surety proves bankruptcy and therefore afterward, but before the discharge, pays the whole debt, he cannot prove for contribution against the other surety under the "contingent liability" clause. For at the commencement of the proceedings in bankruptcy it was a liability depending wholly upon a contingency. Such are the uniform decisions in England and America.

Porter et parte, 2 Mass. & Ayr. 231.
Clements v. Langley, 9 Barnwall & Adolphus 372,
2 Neville & Manning 269.
Wallis v. Swinburne, 1 Exch. 206.
Dana v. Sparks, 1 Ind. 397. 7 Ind. 499.
Dale v. Warren, 23 Me. 94.
Swain v. Barber, 29 Vt. 292.
Goss v. Gibson, 8 Humph. 197.
Kerr v. Clark, 11 Hump. 77.

In England it required the special provisions of the Bankrupt Consolidation Act of 1849, to allow the proof in bankruptcy in the case just stated. See Adkins v. Farrington, 5 Hurlstone & Norman 586. The case of Tobias v. Rogers, 13 N. Y. 59, seems to be to the contrary, but I submit it is outside the current of the authorities.

The distinction between contingent liabilities and liabilities depending upon a contingency, is illustrated by the case of a plaintiff in a suit at law to pay the defendant the costs of the suit if the plaintiff fails. This is not a contingent liability but a liability depending upon a bare contingency, that is, upon the defendant's recovering judgment for costs after the plaintiff has filed his petition in bankruptcy. In such a case, though the defendant recovers the judgment for costs after the plaintiff has filed his petition, and before his discharge, he cannot prove his demand against the estate in bankruptcy on the ground of an existing contingent liability at the date of the petition.

Wilkins v. Warren, 27 Maine 488.
Oxlade v. The North-Eastern Railway Co., 33 Law Journal, Common Pleas, 171.
Dows v. Griswold, 129 Mass. 440.

So, again, a contract or bond by A to indemnify B against any costs he may be called upon to pay C in a suit then pending between B and C, is not a contingent debt or liability of A before the suit is determined, and if A goes into bankruptcy before such termination of the suit, his discharge is not a bar to a subsequent suit on his bond to

recover the costs subsequently awarded to be paid by B to C. Hankin v. Bennett, 8 Exch. 107.

It required special legislation in England to allow the demand to be proved in such a case, and the legislation was contained in the act of Parliament of 1869.

And the liability of sureties on the bonds of public officers, cashiers, treasurers, &c., is a liability depending upon a contingency, and not a contingent liability. If, therefore, such sureties go into bankruptcy before any breach of the bond, and a breach occurs before their discharge, the liability cannot be proved against their estate, and would not be barred by their discharges.

Woodward v. Herbert, 24 Me. 362.
Dyer v. Cleveland, 18 Vt. 241.
Ellis v. Ham, 28 Me. 385.
Loring v. Kendall, 1 Gray 305.
Fowler v. Kendall, 44 Me. 448.

And even though one breach had occurred of such a bond prior to the bankruptcy, the English courts, before the act of Parliament of 1861 allowing it, always held that the bond could not be proved in bankruptcy against the surety, since future breaches of the bond might also occur. Marchman v. Brookes, 2 Hurlston & Coltman 908.

Under the old system of bankruptcy, a claim for rent under a lease for a quarter unexpired when the lessee went into bankruptcy, could not be proved against his estate as "a contingent demand," although the lessee still remained in possession, because at the beginning of the bankruptcy it was uncertain whether the bankrupt would continue to occupy the entire quarter, and if he did not, no claim for a quarter's rent could ever arise under the lease. It was a demand depending upon a contingency, and not a contingent demand.

Savory v. Stocking, 4 Cushing 607.
Bosler v. Kuhn, 8 Watts & Sargent 183.
McDougal v. Paton, 8 Taunton 584.
Stinemets v. Ainslee, 4 Denio 573.
Prentiss v. Kingsley, 10 Penn. St. 120.
Lansing v. Prendergrast, 9 Johnson 127.

It required the enactment of sec. 5071 of the Revised Statutes of the United States to change the law as to this class of demands. See Treadwell v. Marden, 123 Mass. 390.

This distinction between a "contingent demand" and a "demand depending upon a contingency," has been fully recognized by this court in Riggin v. Maguire, 15 Wallace 549. There R. conveyed to R., in fee, with a covenant that he had an indefeasible estate in the in the land. In fact the wife of T., a former owner, who was still living, had an inchoate right of dower therein, not having signed her husband's deed conveying to R. Subsequently R. obtained his discharge under the bankrupt act of Congress of 1841. Five years after that, T. died, and his widow set up her claim for dower in the premises, which the grantee of R. was obliged to pay, and he brought suit against R. on his covenant of warranty in his deed. The court held that R's discharge in bankruptcy was no bar to the suit, as the claim was not provable against R's estate in bankruptcy, it not being certain at the date of the bankruptcy that the covenant in the deed would ever give rise to an actual duty or liability. The cases of Jamison v. Blower, 5 Barbour 686, and Shelton v. Pease, 10 Missouri 475, though cited as sustaining an opposite doctrine, were wholly disregarded. See, also, upon the same proposition,

French v. Moss, 2 Gray 111.
Bush v. Cooper, 18 Howard 82.
Bennett v. Bartlett, 6 Cushing 225.
Read v. Pierce, 36 Me. 456.
Burrows v. Wilkerson, 31 Miss. 537.
Manion v. Campbell, 10 Missouri Ap. 92.

From the well settled doctrine in such cases that the proof could not be made as of a contingent liability, it was found necessary in England to especially provide for the case, which was done by the act of Parliament of 1861, sec. 153.

Ex-parte Elwes, 33 Law Journal, Bankruptcy, 823.

Conceding that I am right in my argument under the act of 1841, it has been contended, and is intimated in some of the cases, that there was material difference in this respect between the act of 1841 and that of 1867. The language of the act of 1867 has already been quoted above—Revised Statutes, sec. 5067. The language of the act of 1841 was: "All persons having uncertain or contingent demands against such bankrupt, may come in and prove such debts and claims under the act, and shall have the right when these debts or claims become absolute, to have the same allowed them."

Sec. 5, Chap. —, 5th Statutes at Large U. S. 445.

Are the words "contingent debts and contingent liabilities" any freer from uncertainty and contingency—the only point material now to be considered—than the words "uncertain and contingent demands," as in the first part of the section from the act of 1841, or the words, as afterwards used in that section, "such demands and claims"? I think it will be seen upon examination of the decisions that the great majority of those made under the act of 1867, agree with the decisions I have referred to under the act of 1841, and that in substance there was no real difference in the provisions of the two acts. I submit Mr. Justice Bradley has stated the true test to be applied in all the cases in Riggin v. Magwire. In that case he said:

"It is argued that under the right given by the 5th section of the bankrupt act of 1841, to prove uncertain and contingent demands, the claim in this case could have been proved under the act. But the better opinion is, that as long as it remained wholly uncertain whether a contract or endorsement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract and endorsement was not provable under the act of 1841. * * * In 1843, Martin Thomas was still living, and there was no certainty that his wife would survive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated, or reduced to present or probable value? If any action at law had been brought on the covenant at that time, nominal damages at most, if any damages at all, could have been recovered. It did not come within the category of annuities and debts payable in the future, which are absolute existing claims. If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principle of life annuities. Had a proposition for a compromise of her right been made between her and the owner of the land, such a mode of estimation would have been very proper. But, without authority from the statute, the assignee would not have been justified in receiving such an estimation and making a dividend on it." 15 Wallace 551–552.

In United States v. Rob Roy, 13 Bankruptcy Register 235, 1 Woods C. C. 43, the defendant had given a bond in a suit to return to the plaintiff the property in controversy, if such should be the final decision, and the court held that this was not a contingent liability within the meaning of the act, and as the defendant went into bankruptcy, and obtained his discharge before the suit was decided, his discharge was no bar to his liability on the bond.

A. deposited property on storage with B. for a reasonable consideration, but no time was fixed. After the property had remained awhile, A. obtained his discharge in bankruptcy, but the property still remained in B's possession. For the storage which accrued after the bankruptcy, it was held A's discharge was no bar.

Robinson v. Peasant, 58 N. Y. 419.

In Wolfe v. Horne, 52 Miss. 185, in a suit against M., the property of Horne was attached as belonging to M. H. gave a bond to dissolve the attachment, and J. became his surety thereon, and H. placed the property in J's hands to secure him from liability as surety, and to hold the same until the litigation terminated. Before it terminated J. went into bankruptcy and received his discharge, still having the property in his possession. Subsequently the suit against M. was dismissed, and J. then refused to re-deliver the property to H., and in defense of a suit for it pleaded his discharge in bankruptcy. The court held the discharge no bar, because the very existence of the claim for a return of the property by J. was contingent upon an event which did not occur until after the discharge in bankruptcy. H. had no claim against J. until the question of J's liability on the bond as surety for H. had been determined.

In the case of Eastman v. Hibbard, 54 N. H. 504, the question arose upon an injunction bond. The suit in which the injunction had been issued was pending when the bankruptcy occurred and was not determined until afterward, and so there was no breach of the injunction bond within its terms. The court held the liability was not provable against the bankrupt, and, therefore, was not discharged.

In Paddleford v. The State, 57 Miss. 118, the court held that the liability upon an administration bond was continuing, and was not discharged by a discharge in bankruptcy.

In the G. & C. R. R. Co. v. Maffett, 8 S. C. 307 (1876), the bond of an agent of a railroad company, conditioned for the performance of his duty as such, was held not discharged as to subsequent breaches by the discharge in bankruptcy of a surety on such bond.

In Steele v. Graves, 68 Ala. 21 (1880), it was decided just as it had been by the Supreme Court of Mississippi in Paddleford v. The State, cited above, that the surety on the bond of an administrator is not discharged from the future defaults of the administrator by the discharge in bankruptcy of such surety.

I do not pretend to say that there are not cases to the contrary of those I have referred to. Haywood v. Shreves, 44 N. J. Law 94, was a case involving annuities—the very case referred to by Justice Bradley in Riggin v. Magwire—and, therefore, is not to the contrary of what I have argued.

The cases of Davis v. McCurdy, 50 Wisconsin 569, Reitz v. The People, 72 Ill. 435, and Jones v. Knox, 46 Ala. 53, involved liabilities upon guardian's bonds, and in each case the liability was held discharged by the discharge in bankruptcy. Probably it did not appear distinctly in each case that the default arose after the proceedings in bankruptcy. However, in Steele v. Graves, 68 Ala. 21, already referred to, the case of Jones v. Knox, 46 Ala. 53, was expressly overruled.

In Boyd v. Robbins, 5 Common Bench, N. S. 497, reversing the same case in 4 Common Bench, N. S. 749, L. had given B. a continuing guaranty for goods to be supplied to K. to the amount of £200, and then obtained his discharge in bankruptcy. B. continued to supply K. with goods after the bankruptcy. The court held that L. was liable, notwithstanding his discharge, and that the guaranty was not a contingent liability under the 12th and 13th Victoria, chap. 106, sec. 78 (1849).

Notwithstanding the English statute has now become, by repeated amendments, much broader than ours in allowing claims "depending upon a contingency" to be proved, yet the English courts still refuse to allow bonds of indemnity to be proved against the bankrupt where the breach did not occur until after the filing of the petition in bankruptcy. See—

Betterley v. Stainsby, Law Reporter, 2 Common Pleas, 568.
Ex-parte Wiseman, Law Reporter, 8 Chancery Appeals, 35.
Kellock v. Enthoven, Law Reporter, 8 Queen's Bench 458, and 9 Queen's Bench 241.

And especially is this the case where, as in the agreement between Johnson and Risk, the contract of indemnity is a contract not to be performed once for all on the happening of a single contingency, but one which is liable to be broken repeatedly at different times upon the happening of various contingencies, and where separate damages could be recovered for each breach. See Ex-parte Wiseman, Law Reporter, 8 Chancery Appeals, 35, which is not very different from the case now before the court.

The English courts give two very good reasons for their ruling: The first is, that in cases like this case of Johnson v. Risk, there is a double contingency, first, that the obligor or bankrupt does not pay the debt himself, and, secondly, that if he does not, the holder of the indemnity will be called upon to pay, or be able to pay if he is. And the court say the bankrupt act did not intend to include contracts involving such double contingencies, but only one single contingency. This view was expressed in Metcalf v. Hanson, Law Reporter, 1 House of Lords, 242.

The other reason given is, that the non-payment of his own debt by a bankrupt himself is not a contingency at all, within the meaning of the statute. The word as there used means something casual, fortuitous, and not something depending upon the mere will or whim of the obligor. To make the act apply to such a case would make it within the power of a bankrupt to make a claim provable, or not, against his estate, according to his election.

In Betterley v. Stainsby, Law Reporter, 2 Common Pleas, 570, Willes, J., said, "It was also decided in Maples v. Pepper, 8 Common Bench, 177, that a contingency that a bankrupt should break his contract, is not such a contingency as is meant by the act." Besides, and in addition to the reasons given, it ought not to be in the power of the party having the indemnity bond to pay the outstanding claims before the final dividend, so as to prove his claim and share in the assets, or by delaying to pay the creditors until after the final dividend, hold his claim over the bankrupt for future collection. Such an election might give the creditor a dangerous power over the proceedings.

I must here concede that the case of Fisher v. Tifft, 12 R. I. p. 56, 18 American Law Reg., p. 9, is almost exactly the case now before the court, and that the decision is directly against what I have contended. The action there was upon a bond, the condition of which was, that the obligors should pay or cause to be paid, all the debts and liabilities of the late firm, of which the obligee, Fisher, was a partner, and save him from loss by reason thereof. This is not the exact language of the contract between Johnson and Risk, but I am inclined to think it is its substance. At the end of the case as reported in 18 American Law Reg., beginning at page 11, will be found a note of Mr. Edmund H. Bennett, of Boston, reviewing the case, and from that note I have taken much of the argument I have made in this brief. In the course of the note, Mr. Bennett said, after noticing the

arguments of the court: "Now as to the authorities cited by the learned court. Some of them do not apparently have a material bearing upon the exact point involved. The only point involved in Jones v. The State, 28 Ark. 119, was whether a surety on a bail-bond was released by his own discharge in bankruptcy, as against the obligee in the bond—a point too plain for question. Exactly similar was Jones v. Knox, 46 Ala. 53, a surety on a guardian's bond. (This case as already stated was overruled in Steele v. Graves, 68 Ala. 21). No doubt the liability of a surety on a bond to the creditor is, as between them, a contingent liability which may be proved against the estate of the surety in bankruptcy. But that is far from this case. Here the question is not whether the obligee of a bond can prove against the estate of a surety thereon, but whether some other party can prove. The only point in Mace v. Wells, 7 Howard 272, also relied upon by the court in Fisher v. Tifft, was whether one who was avowedly and expressly only a surety for another, could prove against the principal for a payment by such surety after the bankruptcy on a claim over-due before—a case clearly provided for by the express terms of the bankrupt act. It must be admitted, however, that the cases of Wood v. Dodgson and Crafts v. Mott support the view taken by the court. To these also might be added:

Aflalo v. Fourdrinier, 6 Bingham 306; 3 M. & P. 743.
Dean v. Speakman, 7 Blackford 317.
Fentress v. Markle, 2 Iowa 553.
Clarke v. Porter, 25 Penna. St. 141, and perhaps others.

But it may be noticed that in some of these cases the retiring partner had either paid the whole or more than his proportion of the joint debt, and therefore was equitably entitled to contribution from his partner, independently of any special bond of indemnity which might give a stronger claim to prove for the excess at least above his share, against the bankrupt partner. Whereas, in Fisher v. Tifft, the plaintiff had not paid even a third of the joint debt, and his claim for reimbursement rested solely upon his bond, and not upon any equitable rule of contribution. This very ground of distinction is relied upon in some of those cases."

It is to be remarked that all the cases referred to by Mr. Bennett, in the portion of the note just quoted, must necessarily have been before this court when it was considering the case of Riggin v. Magwire, already referred to, and must have been disregarded by the court.

On the other hand, the case in 9 Benedict 286, in the District of Phelps, also reported in 17 Bankruptcy Register 124, seems clearly in favor of the plaintiff's recovery here, and is almost the reverse of Fisher v. Tift. In that case, P. and E. being co-partners, P. sold out to E. his interest in the firm, agreeing to pay all the firm debts, and save E. harmless therefrom. Afterward, P. being adjudged a bankrupt, and the firm debts remaining unpaid, E., without having paid anything on such debts, claimed the right under sec. 5068 of the Revised Statutes of the United States, to prove against the estate of P. for the difference between the amounts of such debts and the dividend which the estate would pay thereon, and to have the present value of P.'s liability to him ascertained. The court held that E. was not entitled to make any such proof, and that there was no present value of such liability which could be ascertained.

Again in Ex-parte Lake, 2 Lowell 544, A, B, C and D, co-partners, were lessors of a building and bound by the covenants to pay rent for several years, and two of the partners left the firm, and the others with some new partners assumed the debts and liabilities. Afterward the new firm became bankrupt. The court held, that the retiring partners had not the right to prove against the estate in bankruptcy a claim for unliquidated damages by reason of their liability on the covenants contained in the lease.

In re Phelps, 9 Benedict 286, already referred to, Mr. Justice Blatchford uses this language: "What is the contingent liability contracted by the bankrupt in favor of Everdell? By virtue of the partnership relation the bankrupt became liable to Everdell, contingent upon Everdell's paying more than his half of the debts of the firm. Everdell had not paid any part of such debts. By virtue of the subsequent agreement between Everdell and the bankrupt, the bankrupt bound himself to pay all the debts of the firm, and to indemnify and save Everdell harmless for and from all liability thereon. This was, substantially, a liability to Everdell, contingent upon Everdell's paying any part of the debts. In either case there must be a payment by Everdell before he can prove any claim. In the one case he must show that he has paid more than half of the debts. In the other case he must show that he has paid some part of the debts. Under the latter clause of sec. 5068, there is no present value of the bankrupt's liability to Everdell that can be ascertained or liquidated." See p. 289.

In Kent v. Thomas, Law Rep. 6 Exch. 312, Baron Channell used the following language: "If the case could not be distinguished from In re Willes, 4 Exch. 530, 19 Law Journal Exch. 30, there might be some difficulty; but that case is distinguishable; and laying it aside, the more recent decisions have clearly settled that where a valuation of the claim is impracticable there can be no proof; a principle wholly inconsistent with the conclusions which we are desired to adopt as established by that case. This is not a liability which there may be merely some difficulty in establishing, but to establish it is substantially impracticable. The right to prove in respect of debts not immediately payable depends entirely on the express provisions of the statute, and it must be clearly made out that that right exists before the corresponding relief of the debtor can be established." p. 317–318. See Baron Bramwell and Baron Piggott to the same effect; and see also Carey v. Dawson, Law Reporter, 4 Queen's Bench 568.

III.

It will scarcely be contended that this claim comes within sec. 5069 of the Revised Statutes of the United States quoted above, inasmuch as it cannot be pretended that Johnson's liability was that of drawer, endorser, surety, bail or guarantor, upon any bill, bond, note or other specialty or contract, or for any debt of another person; nor that his liability became absolute after the adjudication of Risk as bankrupt, and therefore the present claim did come within that section.

Johnson's liability to L. Tiff Risk was original as one of the partners of Johnson, Risk & Co., or Risk & Johnson, and was not secondary in any respect, or as surety, nor for the debt of any other person. Nor did anything happen pending E. F. Risk's bankruptcy, making Johnson's liability to L. Tiff Risk any more absolute than it was before E. F. Risk became a bankrupt. Assuming then, that this section of the bankrupt law is immaterial here, I will pass to the last section which can be supposed to be material.

IV.

So we come to sec. 5070 of the Revised Statutes of the United States, and it will be noticed that the court in Fisher v. Tifft, 12 R. I. 56, placed its decision equally on that section and sec. 5068. In the opinion of that court, Fisher, the retiring partner, was in the attitude of a person liable for the other member of the firm of H.

Tiff & Co., who became bankrupt, for a debt which that firm owed, which debt Fisher had not paid, but was still liable for when Tiff became a bankrupt, and under that section could have proved in bankruptcy against Tiff's estate.

Now this question is very fully argued by Mr. Bennett in his note to Fisher v. Tiff, in 18 American Law Register, p. 12, and following, already referred to, and I shall take the liberty of availing myself of a large part of his argument in this connection:

"Is an outgoing partner who still remains bound to the original partnership creditor and on the original partnership debt, liable as surety or guarantor for his remaining partner, merely because the latter has, as between themselves agreed to pay the whole debt, and to indemnify the other from his liability, the creditor having done nothing to release him from his original and primary obligation? That such outgoing partner is still an original debtor, and not a surety, so far as the creditor is concerned, must of course be admitted. If sued by the creditor he must be sued as a co-partner, and not as a surety or guarantor. As to the creditor, the outgoing partner is still originally and not collaterally liable. He would not be discharged or released by any extension or indulgence as to payment by the creditor to the remaining partner, as a surety or a guarantor might be. Would he be at the same time principal debtor to his creditor, and surety only as between himself and his partner, without some express agreement or understanding to that effect? The argument is, that because the remaining partner ought equitably to pay the whole debt, the retiring partner stands to him in the light of a surety merely, in equity at least, and therefore should be so considered in a suit at law by him against the other for contribution or remuneration. It is true doubtless, that in equity the outgoing partner may for some purposes be considered to stand in the same situation as a surety, strictly so called. For this reason he should be entitled in a court of equity, if he was called upon to pay the whole debt, to be subrogated to the rights of the creditor as to any collaterals or security the creditor might hold against the remaining partner for the same debt, and so might enforce them in equity in the name of the creditor against his former partner. But this relief would be allowed him only in equity, and because it is for his advantage and protection, and in order to compel the real debtor to pay the debt himself. But does the same rule apply at law in a suit by him to recover remuneration, when the effect of it would be exactly the reverse, viz., to deprive him of a

remedy and release the true debtor from paying anyone? Does not the maxim *cessante ratione, cessat ipsa lex*, apply? That is the question involved in Fisher v. Tifft," and it is to be determined in view of the provision of sec. 5072 of the Revised Statutes of the United States, already quoted, that "no debts other than those *specified* in the five preceding sections shall be proved or allowed against the estate." This section seems to forbid in express words any extended construction of the word "surety," or the phrase "otherwise liable for the bankrupt," and to require that the court in construing sec. 5070, should see to it that the exact case to which it applies the section, or any provision of it, is technically and verbally within it. The English courts put a strict construction upon the words, "surety or other person liable for the bankrupt," and refuse to extend the term so as to include those who might equitably be considered a surety or person liable for the bankrupt, such as to bail, who may become such before the bankruptcy, but who are not called upon to pay until after. These were not allowed to prove under the Bankrupt Act of 49 Geo. 3d, chap. 121, sec. 8, as a surety or person liable for the bankrupt, and it required additional legislation to include their case by express words. See Newington v. Keeys. 4 Barnwall & Alderson 493; Hewes v. Mott, 6 Taun. 329; 2 Marshall 192, and Goddard v. Vanderheyden, 3 Wilson 262.

The bail of a bankrupt, who pays money solely for his benefit, certainly has as good a right to indemnity and share in the assets of the bankrupt, and to be considered as an equitable surety for him, as a co-partner has who, in paying his money to the partnership creditor, only pays his own debt, and for which debt he had received from such creditor the original consideration.

In Hoare v. White, 3 Jurist N. S. 445, 40th Eng. Law and Equity 366, the plaintiff was under-tenant to the defendant, and the defendant had agreed to indemnify him against paying rent to the head landlord, and then went into bankruptcy, and the tenant was compelled to pay the whole rent. After the defendant's discharge he sued him for the same, and it was claimed that the plaintiff was "a surety or person liable for the debt of the bankrupt," and might have proved his claim in bankruptcy, and therefore it was now discharged. The term "surety" in the bankrupt laws it was said, had had the widest extension, and Wood v. Dodgson, 2 M. & S. 195, and Vansanden v. Corbie, 3 Barn. & Adol. 13 were cited. But the Court of Exchequer without even calling upon the other side said there must be judgment for the plaintiff.

Again, where the plaintiff was the acceptor of a bill of exchange which the defendant, for good consideration, subsequently agreed to pay and indemnify the plaintiff therefrom, but went into bankruptcy and the plaintiff was compelled to pay the bill, it was held he could not prove the same against the defendant on the ground of being a surety or other person liable for him. Yallop v. Ebsen, 1 Barnwall & Adolphus 698.

So, one who draws a bill payable to his own order and then endorses it for the accommodation of the next endorsee, is not "a surety or liable for the debt" of such endorsee so that he could prove in bankruptcy against him. Mayer v. Meakin, Gow 183.

There may not be entire consistency in the views of the English courts on this subject, since it has several times been held that an accommodation endorser is "a person liable for the debt" of the maker so accommodated, and if the latter goes into bankruptcy, the former having paid the debt may prove against his estate and so is barred by his discharge. Bassett v. Dodgin, 9 Bingham 652; Vansandan v. Corsbie, 3 B. & Adol. 13; Steadman v. Martinnant, 13 East 427; Ex-parte Lloyd, 1 Rose 6; Ex-parte Yonge, 3 Vesey & Beam. 40.

The Supreme Court of Massachusetts considered the very question involved in Fisher v. Tifft, in Morton v. Richards, 13 Gray 15, a case arising under the insolvent statute of that State of 1838, chap. 163, p. 3. That statute allowed the proof of any sum paid "by any surety of the debtor in any contract, if the payment was made before the first dividend." The plaintiff had been in company with one Johnson, under the firm of Johnson & Morton. Morton sold out to one Daniels, and the new firm of Johnson & Daniels assumed all the liabilities of the old firm of Johnson & Morton, and agreed to indemnify Morton against his liability therefor. Johnson & Daniels then went into insolvency, and one of the old creditors compelled Morton to pay his whole debt, and Morton offered to prove the same against Johnson & Daniels before any dividend had been declared, on the ground that he had paid it as surety for them. But the full court refused to allow it on the ground that he was not a surety, but a principal debtor, and in paying it he paid his own debt. A surety, said the court, is "he who becomes answerable by contract with another for the payment to him of a third person's debt, or for the performance of a third person's undertaking or duty." This case, I submit, is in direct conflict with Fisher v. Tifft.

It is true, as has already been stated, that the bankrupt act (Revised Statutes U. S. sec. 5070) uses the phrase "or otherwise liable for the bankrupt." But does not that mean otherwise similarly liable—*ejusdem generis*? The same general phrase was found in the English bankrupt act, but was held not to extend to all liabilities. The phrase is liable "for" the bankrupt. One co-partner is liable with his partner, but not exactly for him. There seems to be as much reason for calling him a guarantor for his partner, as for saying he is a surety. The familiar maxim of *noscitur a sociis* applies. General words are often restricted by prior specific words. Thus the words "other person whatever" after "tradesmen, artificers, workmen, laborer or other person whatever," does not include every person—a stage driver, for instance—but only persons *ejusdem generis*. Sandiman v. Beach, 9 Barnwall & Cresswell 96. Nor do such words in the connection referred to, include an attorney.

Peate v. Dickens, 1 Crompton, Meeson & Roscoe 428.

A statute which forbids "any artificer, calico printer, &c., &c., or any other person" from absenting himself from his employment, does not apply to a house servant.

Kitchen v. Shaw, 6 Ad. & El. 729.

A statute which enacts that "no writ or process shall be sued out against any district surveyor, or other person for anything done under the act, without a month's notice," does not apply to every other person, but only to persons *ejusdem generis* with district surveyors.

Williams v. Golding, Law Rep., 1 Common Pleas 69.

A power to tax "auctioneers, grocers, merchants, &c., and all other business, trades, associations or professions whatever," does not include the business or profession of a lawyer.

City of St. Louis v. Laughlin, 49 Mo. 559.

A law prohibiting any person to navigate "any lighter, wherry, or other craft," does not apply to one navigating a steam tug of eighty-seven tons burthen, but only to vessels of the same kind as lighters and wherries.

Reed v. Ingham, 3 Ellis & Blackburn 889.

A statute "that whenever the exigencies of an army in the field are such as to make impressment of forage, articles of subsistence, or other property" absolutely necessary, it may be made, does not include all other property, but only similar to those specified in the act.

White v. Ivey, 34 Geo. 199.

A statute giving a board of officers power to remove "for incompetency, improper conduct or other cause satisfactory to the board," means only kindred causes.

State v. McGarry, 21 Wis. 496.

Analogies therefore, I submit, sanction the conclusion that the words "otherwise liable for the bankrupt," should be confined to liabilities similar to those of sureties, guarantors, and the like, and that they do not extend to such a liability as Risk assumed to Johnson by the contract between them exhibited with the bill.

The popular or received import of words furnishes the general rule for interpretation.

Millard v. Lawrence, 16 Howard 251.

When the Legislature uses a term without defining it, which is well known in the English law, it must be understood in that sense.

McCoole v. Smith, 1 Black 459.

When words in a previous law have acquired through judicial interpretation a definite meaning, they will, when used in subsequent laws, be presumed used in the same sense.

The Abbotsford, 98 U. S. 440.

General terms are to be limited so as not to lead to injurious or absurd consequences. The Legislature is presumed to have intended exceptions avoiding such results.

United States v. Kirby, 7 Wallace 482.

Reiche v. Smythe, 13 Wallace 162.

The court ascertains the meaning from the words and subject-matter to which the statute relates, and restrains its operation within narrower limits than the words import, if the literal meaning would extend to cases the Legislature did not design to include.

Brewer v. Blougher, 14 Peters 178.

V.

The question of jurisdiction remains. It is manifest from the record that the rights of Johnson and the representatives of Risk, in this suit, depend entirely upon the construction that may be given the provisions of the bankrupt act of Congress of March 2, 1867. The bill, after stating E. F. Risk's petition in bankruptcy and the granting of his discharge thereon, submitted that the discharge did not discharge

Risk or his estate from liability to Johnson, on the contract of indemnity exhibited with the bill.

Record pp. 4, 6.

In Starin v. New York, 115 U. S. 257, a case arising under the removal clause of the act of Congress of March 3, 1875, 18 Statutes at Large 470, this court laid down the following test of a suit arising under the Constitution or laws of the United States: "If from the questions it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution, or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States within the meaning of that term as used in the act of Congress of 1875; otherwise not. Such is the effect of the decisions on this subject." 115 United States 257.

The distinction between the portion of the act of Congress of March, 1875, just referred to, having reference to the removal of causes from State to Federal Courts, and sec. 709 of the Revised Statutes of the United States, having reference to the removal of final judgments or decrees from the highest court of a State to this court upon a writ of error, was pointed out in Carson v. Dunham, 121 U. S. 421, and it was shown that the jurisdiction under the latter statute is much more extensive, and extends not only to suits "arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority," but also extends to suits "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority."

121 U. S. 428.

However, without multiplying authorities, I submit that the case of Palmer v. Hussey, 119 U. S. 96, is conclusive of the question as presented in this record. In that case Palmer had recovered a judgment against Hussey, pending Hussey's proceedings in bankruptcy, and afterwards Hussey applied to the Supreme Court of New York to enjoin the collection of the judgment after he had obtained his discharge in bankruptcy on the ground that the judgment had been discharged thereby. The Supreme Court denied Hussey's application, holding that the debt was of a character not to be discharged, and on

appeal to the Court of Appeals of New York, the judgment of the Supreme Court was reversed; that court holding that Kinney's debt had been discharged by the discharge in bankruptcy, and that Kinney was entitled to relief against the judgment in favor of Palmer for the debt. Palmer then sued out a writ of error from this court to the Court of Appeals of New York, and Kinney moved in this court to dismiss Palmer's writ of error. The court decided that the motion to dismiss should be denied, and proceeded to the decision of the suit. It seems to me this is directly in substance the present case.

Assuming then the jurisdiction, the next question is, whether or not the record discloses such a Federal question as authorizes this court to review, and reverse, or affirm the judgment of the Supreme Court of Tennessee? In other words, did the decision of this suit in the Supreme Court of Tennessee, necessarily turn upon the effect of the discharge of E. F. Rick in bankruptcy, or was there some other question in the case upon which that court might rightfully have decided the case as it did, notwithstanding the question arising out of the discharge in bankruptcy?

In Klinger v. the State of Missouri, 13 Wallace 257, the court laid down the following test in such cases: "Where it appears by the record that the judgment of the State court must have been based either upon a law which would raise a question of repugnance to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did in fact base its judgment on such independent ground and not on the law raising the federal question, this court will not take jurisdiction of the case even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then if the independent ground on which it might have been based was a good and valid one sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the federal question, and this court will then take jurisdiction." 13 Wallace 268.

In the very late case of De Saussure v. Gaillard, 127 U. S. 216, the court approved the rule thus laid down by Mr. Justice Bradley, and said further: "It has been repeatedly decided under sec. 709, of the Revised Statutes, that to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively not only that a

federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." 127 U. S. 234.

It will be noticed that the rule as stated by Mr. Justice Bradley requires this court to look at the independent ground on which the judgment of the State court might have been based to determine if it was a good and valid ground and sufficient of itself to sustain the judgment of the State court, and requires this court if it determines that such independent ground was not a good and valid ground on which the State court could have based its judgment, to presume that the State court based its judgment on the law raising the federal question. Justice Matthews expresses the same idea in De Saussure v. Gaillard, when he says it must appear "that the judgment as rendered could not have been given without deciding it, (the federal question)." 127 U. S. 234.

Of course Justice Matthews spoke not of the physical fact that the court could not have given the judgment without deciding the federal question, but had reference to its giving such judgment rightfully and according to law. Indeed, this court has gone much further, and has said, "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it, is as much against the right within the meaning of sec. 709 of the Revised Statutes as if it had been specifically referred to and the right directly refused. But if a decision of such a question is rendered unnecessary by the view which the court properly takes of the rest of the case within the scope of the pleadings, the judgment is not open to review here." Chapman v. Goodnow, 123 U. S. 548.

This rule was acted on in the case of the Des Moines Navigation and R. R. Co. v. the Iowa Homestead Co., 123 U. S. 552. In that case the court said, "We cannot look upon the reason given by the court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling federal question fairly presented by the pleadings, proofs and assignment of errors,

and necessarily involved in the determination of the cause. That question stood to the very close of the litigation and all controlled in favor of the Huntington and Richmond Co., against the validity of the To give a judgment the other way without considering it, was simply to ignore one of the most important elements of the case as it stood in the record. There was no escape from this conclusion." 123 U. S. 555.

In the later case of Brooks v. Missouri, 124 U. S. 394, the same rule was recognized.

VI.

Then did the demurrers interposed to Johnson's bill in this case by the defendants below raise such a question that the State court might lawfully have based its decision thereon without noticing or deciding the federal question contained in this record? It will be noticed that the demurrers did not raise the question of the right of Johnson to maintain his suit against Thos. L. Risk, the administrator, personally, for the breach of duty committed by him in the course of the administration of his father's estate, as stated in the bill. The substance of the charge against him was that while creditors had two years and a half and three years and a half within which to present their claims against his intestate's estate, and he was required by the statute in case he paid over to the distributees even after the end of two years, the shares to which they were respectively entitled, to take refunding bonds from them for the indemnity of the creditors who might subsequently establish their claims, he in fact, within less than three months after the grant of administration to him and before the six months after such grant within which he was protected by statute from suit had expired, proceeded to distribute the estate among the distributees and pay to each one of them what, upon such distribution he determined to be the amount properly to be paid and close his administration. Of course, no one could deny the liability of Thos. L. Risk to Johnson in this suit upon such a state of facts, provided Johnson had a just cause of action against his intestate's estate. It is equally as clear that it was proper for Johnson to join the sureties of Thos. L. Risk on his administration bonds as defendants along with him in this suit. The Code of Tennessee, sec. 5033 (4319) expressly so provides. And in the case of Payne v. Hook, 7 Wallace 425, this court decided that the sureties of an administrator on his official bond, may properly be joined with him in an equity proceed-

ing for an erroneous and fraudulent administration of the estate by him, and where if a balance should be found against the administrator, those sureties would be liable.

So far as the special point raised in behalf of Mr. Warriner, one of the sureties, is concerned, it could not appear until the merits of the case came to be determined, whether the liabilities should fall on the sureties on the bond as administrator *de bonis non*, or the sureties on the first bond, or on both equally, or on each successively. Such liability of each set of sureties would depend on the facts established by the evidence.

It will be noticed, however, that the charge in the bill was that Thos. L. Risk, under his appointment as administrator *de bonis non*, had filed no inventory of the assets of the estate of his intestate, and had taken no steps in the administration. Record pp. 5–6. The Code of Tennessee expressly requires an administrator to file an inventory of the assets of the estate. Code 3082 (2241). The condition of the bond given by the administrator is, "shall well and truly perform all the duties which are or may be required by law. Code sec. 3064 (2225).

Here then was a direct charge in the bill of a breach by Thos. L. Risk of the condition of the bond on which Mr. Warriner was one of the sureties, and necessarily a right of recovery in favor of Johnson upon that bond for some amount, such amount depending upon what the proof might develop on the hearing of the cause to be the damages he had sustained. But should it be held that Warriner as a surety was not properly sued, or that the other sureties on the administration bonds of Thos. L. Risk were not properly sued, still such a decision would not meet the equity of this case as against Thos. L. Risk, who would still be personally liable on the facts stated in the bill, and against whom Johnson would still be entitled to his decree, though he might not succeed as against the sureties.

Now as to joining the other defendants along with Thos. L. Risk, and the sureties on his administration bonds, as defendants, it will be noticed that no objection is made to the bill on this ground, or on any ground of multifariousness. I suppose it is beyond question that the distributees of the estate of E. F. Risk, who had received their distributive shares from Thos. L. Risk as administrator, could be called on for contribution by Johnson as a creditor, if it was necessary for them to repay or refund a portion of what they had received, in order

to satisfy Johnson's debt. Judge Story lays down the principle generally, "That in cases of a deficiency of assets for the payment of all legacies, if any of the legatees have been paid their whole, or a larger proportion before all the debts are ascertained, they may be compelled to refund and contribute in favor of the unpaid debts, or the creditors, at the instance of other legatees, and in many cases, although not universally, at the instance of the executor himself." 1 Story's Equity Jurisprudence, sec. 503.

This court, in Union Bank of Tennessee v. Jolly's administrators, 18 Howard 503, decided the general proposition that where an estate turns out to be insolvent, but a fund remains in the hands of the administrators for the distributees, the creditors can recover such fund by a bill in chancery against the administrators, notwithstanding the proceedings in the State probate court have had the effect, under the State law, of barring the claims of such creditors against the estate. In Tennessee the right to contribution and to maintain a suit for that purpose in such cases as that presented here, is well established. (See an instance in Ewing v. Maury, 3 Lea, 381.)

No question of equity jurisdiction arises in this case, for the reason that in Tennessee, by statute, it is provided that the chancery court "shall have and exercise concurrent jurisdiction with the circuit court of all civil actions triable at law, except for injuries to person, property, or character, involving unliquidated damages." Code, sec. 5043.

So the chancery court of Shelby county and the Supreme Court of the State of Tennessee had the jurisdiction appropriate to both a court of law and a court of equity, as understood in the strict practice of this court, and the first ground of the demurrer of Thos. L. Risk and others, that there was no equity on the face of the bill, (record p. 9) was without force.

The only remaining ground of the demurrer which could present a question other than a federal question, on which the judgment of the court below could have been rested, is that which raises the question of the statute of limitations. Johnson's right of recovery in this case, as appears from the first portion of this argument, is rested entirely on the proposition that his cause of action as against E. F. Risk, or his personal representative, did not accrue until after he had paid the judgment to L. Tiff Risk, on the 27th day of August, 1885, and this suit was commenced on the 23th day of October, 1885, within less than three months after the payment.

The Code of Tennessee provides generally, "All civil actions other than those for causes embraced in the foregoing article (having reference to real estate) shall be commenced after the cause of action has accrued within the periods prescribed in this chapter, unless otherwise expressly provided." Sec. 3466 (2769). It is essential, therefore, to the operation of any statute of limitations, embraced within the article, that the cause of action should first have accrued. The same provision is contained in sec. 3472 (2775), prescribing the limitation of six years. There is no limitation of seven years as applicable to personal actions.

Even if Johnson's right of action against E. F. Risk had accrued when L. Tiff Risk recovered the judgment against Johnson on the 22d of April, 1878, (record p. 4) still E. F. Risk died on the 20th of June, 1882, and before six years from the rendition of that judgment had expired. The cause of action not being barred against E. F. Risk at the time of his death by any statute of limitations, upon his death the six years statute, or general statute, ceased further to operate, and the statute applicable to demands against estates of deceased persons began to run. See Code, sec. 3454 (2760).

Treating then this last mentioned statute, that is the statute applicable to demands against the estates of deceased persons, as the only one necessary to be considered here, let us see what it provides: "The creditors of deceased persons if they reside within this State, shall within two years, and if without shall within three years from the qualification of the executor or administrator, exhibit to them their accounts, debts and claims, and make demand, and bring suit for the recovery thereof, or be forever barred in law and equity."

Code, sec. 3117, (2297).

"Actions against the personal representative of a deceased person shall be commenced by a resident of the State within two years, and by a non-resident within three years after the qualification of the personal representative, if the cause of action accrued in the lifetime of the deceased, or otherwise, from the time the cause of action accrued."

Code, sec. 3481, (2784).

These two statutes have always been construed together, and have been harmonized, as will appear by reference to the decisions to be referred to further on.

Thus in Maynard v. May, 2 Cold. 44, it was settled that the six months allowed executors and administrators to ascertain the situation

of the estate, see Code, 3112, (2774), and within which they would not be sued, was to be added to the two and three years allowed under the above sections of the Code within which to bring the suits therein provided for. See also Todd v. Wright, 12 Heiskell 442. And hence it is now the established rule in Tennessee, that residents have two years and a half, and non-residents three years and a half after the qualification of the executor or administrator, or after their causes of action have accrued, within which to bring their suits against the representatives of estates, and not two years and three years as expressed in the statute.

It will be noticed also that the express language of sec. 3481, (2784), is that the action shall be commenced after "the qualification of the personal representative, if the cause of action accrued in the lifetime of the deceased, or otherwise, from the time the cause of action accrued," within the periods limited by the statute.

From the earliest judicial history of the State of Tennessee it has been established that the limitations in favor of the representatives of deceased persons provided in the above quoted sections of the Code, did not begin to run until the cause of action had accrued.

The case of Marshall v. Hudson, 9 Yerger 57, presented the exact question. Marshall and Tate were the sureties of Earthman, the principal debtor in a note. Earthman died, and an administration was granted on his estate. No claim was presented by the creditor against Earthman's estate within the time required by the statute, but subsequently to the attaching of the statute, the creditor brought a suit against the administrators, who pleaded the statute, and the estate of Earthman was held discharged, and a judgment rendered in favor of the administrators. The creditor then sued Marshall, one of the sureties on the original note, and recovered judgment against him, and Marshall paid the judgment. Marshall thereupon moved for judgment over under the statute, against Earthman's administrators, and the Supreme Court held he was entitled to recover.

In the later case of Maxey v. Carter, 10 Yerger 521, a judgment was rendered against one of two sureties, who paid the judgment. That surety then made a motion against the personal representatives of his co-surety for contribution, and the Supreme Court held that the statute of limitations commenced running against the creditor making the payment from the time he paid the money, and not from the time the judgment was rendered against him.

The next case was Caplinger v. Vaden, 5 Hump. 629. There Sullivan warranted the title of slaves to Caplinger, and died. The slaves were recovered from Caplinger, Sullivan's title being adjudged invalid. Caplinger thereupon sued Sullivan's administrator upon his warranty of title, and the court held that he was not a creditor of Sullivan, nor of his representative within the meaning of the statute until the recovery of the slaves from Caplinger, and that the statutes of limitation did not begin to run against Caplinger upon his right to sue upon Sullivan's warranty, until that time.

In the later case of Reeves v. Pulliam, 7 Baxter 119, the old cases were approved, and it was held that notwithstanding the surety is entitled to a judgment over against his principal upon a judgment being rendered against him as provided in the statute, yet his cause of action against his principal is the payment of the judgment, and the statute of limitations begins to run against him from the time of such payment, and not from the rendition of the judgment.

The case of Reeves v. Pulliam, 9 Baxter 153, is almost the same in effect, or is probably the same case.

In the still later case of Ewing v. Maury, 3 Lea 381, the court said, referring to the cases already referred to, "Strictly speaking, according to these cases, the surety is not a creditor until he has paid the debt, but may proceed after judgment by virtue of the statute."

Assuming the law to be then as these decisions show it to be, it would be unreasonable to suppose that the Supreme Court of Tennessee based its decision in this case upon the ground that the demand of Johnson was barred by the statute of limitations. Such a decision could not possibly have been rendered without disregarding the established law. Of course this court will not presume the Supreme Court of Tennessee did any such thing, but as such ground was not a good and valid one, as Justice Bradley said in Klinger v. The State of Missouri, 13 Wallace 263, will presume that the State court based its judgment on the law raising the federal question, and will therefore take jurisdiction.

Wm M. Randolph
for Plff in error

FILED
NOV 26 1888
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

JOHN JOHNSON, Plaintiff in Error,

vs.

THOMAS L. RISK, Et Als.,

No. 665, OCTOBER TERM, 1888.

BRIEF FOR DEFENDANTS IN ERROR.

1st. It is submitted that this court has no jurisdiction of the case and the writ of error should be dismissed.

The bill was dismissed by the Chancery Court on demurrers thereto, and the decree of that court was simply affirmed by the Supreme Court of Tennessee.

Trans. pp. 11 and 12.

The decree of the former court adjudged that "said demurrers be sustained, and the complainants bill be dismissed, etc."

This is clearly a judgment sustaining the demurrers, and every part and assignment thereof. It is not an adjudication merely of the federal question, or of the non-federal question—but of both. The demurrer raised not only a federal question, but other independent questions, and the judgment of the court decided all of them for the demurrants.

Trans. pp. 9 and 11.

How then can it be said that it "*affirmatively* appears to the court not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision *was necessary* to the determination of the case, or that it was actually decided,

or that the judgment as rendered could not have been given without deciding it."

DeSeaussure vs Gaillord, 127, U. S. 216.

The statutes of limitation assigned as grounds of demurrer were entirely sufficient to defeat the bill independent of the federal question, and the judgment as rendered could have been given without deciding that question. The decree of the court therefore must be considered as having decided independent questions aside from the federal question.

2d. But if this be not so, it is submitted that if it be assumed that it does not appear on which of the two grounds the judgment was based, still it should be held that the defence of the statutes of limitation was good and valid within the rule laid down by the court in Klenger vs. Missouri, 13 Wall. 257. If this rule is still adhered to by the court, and under it the validity of the non-federal question is always decided here before it is determined whether the court will take prediction of a given case, the result of decisions of non-federal questions (sometimes of statutory or local laws) adverse to the decisions of the State courts, must often ensue.

But the defence of the statute of limitations under the Tennessee law was a valid one in this case.

The counsel for plaintiff in error, on page 32 of his brief, correctly quotes the statutes of limitations barring creditors of deceased persons. The plaintiff in error was a resident of Tennessee, and as a creditor of E. F. Risk's estate, his demand was barred after two years and six months from the qualification of the administrator.

The cause of action sued on accrued in the lifetime of E. F. Risk. The bill states that the judgment in favor of L. Tiff Risk against the plaintiff in error was recovered on 22d day of April, 1878, and of course the suit was brought prior to that time. It also states that E. F. Risk died in 1882, about four years after the date of the judgment. It

is insisted that the cause of action in favor of plaintiff in error against E. F. Risk accrued when L. Tiff Risk's suit was brought against the plaintiff in error under the contract, filed as exhibit to the bill. It will be observed that under that contract E. F. Risk assumed payment of all the partnership debts, and bound himself to pay the same and protect and keep Johnson harmless from the payment of any part thereof. Besides, the contract gave Johnson a lien upon the real estate, machinery, etc., and provides "In the event that Johnson should have to pay any of said debts, *or be sued thereon*, * * then he may proceed forthwith to enforce the liens herein retained and granted by proper proceeding therefor."

So that in express terms the right of action to enforce the lien is given *when Johnson is sued* on any of the debts. The lien is a mere incident to a debt or the personal liability of the pledgor or mortgagor. It is not enforcable until the debt matures or the liability accrues. Hence it is submitted that the contract should be so construed that the bringing of a suit against Johnson not only entitled him to enforce the lien but also to pursue his remedies against Risk personally. In other words, the intention of the parties by the contract was to give a right of action to Johnson against Risk as soon as the former was sued on any of the debts.

3d. But it is further insisted that the demand was provable under Sec. 5070 of the Revised Statutes. It could have been proved by the creditor, or by Johnson, as provided by the general order, which is, that the claims of persons contingently liable may be proved in the name of the creditors, when known; *if not known, then in the name of the person contingently liable.*

Bump. on B.; 9th Ed., pp. 873-874.

This provision of the Revised Statutes puts at rest the questions formerly made under the preceeding laws.

Crafts vs. Mott, 4 N. Y., 604.
Fisher vs. Tifft, 12 R. 1., 56.
S. C. 18 Amer. Law Reg., 9.

Reggin vs. Magwire, 15 Wall, 549.
U. S. vs Throckmorten, 8 B. Reg., 309.
Ebberhardt vs. Wood, 2 Tenn. ch, 488.
S. C. 6 Lea (Tenn.) 467.

But the cases are so fully and fairly cited by the learned solicitor for the plaintiff in error that it is needless to do more than refer to his brief. An examination of the statute and cases will, it is submitted, explode his contention. The confusion arises from the failure to distinguish between the provisions of Secs. 5068 and 5070 of the Revised Statutes. It may be conceded for the argument that this claim was not provable under the former section, while it was clearly provable under the latter.

And in Re. John F. Phelps, 9 Benedict, 286, so much relied on by adversary counsel, the effort was to prove the claim of the surety under section 5068. And in that case the court—Blatchford, J.—distinctly stated: "Everdill, therefore, under section 5070 and general, order No. 34, as a surety for the *bankrupt* or a person contingently liable for him, may prove the claim in respect of which he is surety or contingently liable under the conditions prescribed by that section and the general order."

In this case Risk, the bankrupt, was liable for the debt both as a partner and under his contract with Johnson, in which he absolutely assumed the payment of the debt, and Johnson, under section 5070 and the general order could have proven the debt "in the name of the creditor or otherwise, as may be provided by the general ordn, etc."

The general order XXXIV provided that "*the claims of persons contingently liable* for the bankrupt, may be proved in the name of the creditor, when known *by the party contingently liable.* When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable."

This we submit is decisive of the question.

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